

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PATRICK TRACY, :
: Plaintiff, :
: :
v. : Case No. 04-CV-06541 DGL (P)
NVR, Inc., :
: Defendant. :
: :
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**DEFENDANT'S MEMORANDUM REGARDING SUBMISSION OF
OPINION LETTERS AND OTHER ADMINISTRATIVE GUIDANCE TO JURY**

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During the October 7, 2013 pretrial conference in this action, the Court directed both parties to file a submission regarding what Opinion Letters and other administrative guidance related to the outside sales exemption, or portions thereof, should be given to the jury. Defendant NVR, Inc. (“NVR”) submits this memorandum in response to the Court’s request.

Submission of Opinion Letters and Other Administrative Guidance

NVR respectfully requests that the Court submit the following, in their entirety, to the jury to aid the jurors in applying the outside sales exemption to Plaintiff’s position:

- Wage & Hour Div. Op. Letter 2007-1, January 25, 2007 (“FLSA2007-1”) (applying outside sales exemption to new home sales employees);
- Wage & Hour Div. Op. Letter 2007-2, January 25, 2007 (“FLSA2007-2”) (new home sales employee who leaves employer’s place of business for “one or two hours, one or two times a week, to engage in selling or sales-related activities” properly subject to outside sales exemption); and
- DOL Field Operations Handbook § 22f06(c) (Nov. 29, 2010) (“real estate salesman” operating from model home on tract of land on which homes are to be built will generally qualify for outside sales exemption).

These documents should be submitted in their entirety to the jury for several reasons. First, each document is directed to the specific context of the industry in which NVR operates. This is critical because the Supreme Court recently emphasized the importance of taking industrial context into account in applying the outside sales exemption. *See Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2160 (2012) (“The statute’s emphasis on ‘capacity’ counsels in favor of a functional, rather than a formal, inquiry, one that views an employee’s responsibilities in the context of the particular industry in which the employee works.”). The guidance listed above also represent the analysis of the exemption undertaken in the context of the new home sales industry closest in time to Plaintiff’s employment in the job at issue. This temporal proximity of the guidance to Plaintiff’s employment furthers the degree to which the DOL’s analysis is calibrated to the conditions in the relevant industry at the relevant time.

The Opinion Letters are also suited to the jury's consideration because they are drafted in a manner that is intended to be understood by laymen. The DOL's Wage and Hour Division provides such Opinion Letters as guidance regarding application of the FLSA in response to inquiries from any member of the public, including employers, employees, and industry groups. In responding to those inquiries, the DOL undertook to explain the relevant legal concepts in ways that would be accessible to people who may not have legal training. As such, the Opinion Letters are likely to be much more helpful to the jury in applying the outside sales exemption than any other description of the concepts at issue that might have been developed for use primarily by legal practitioners.

Further, it is important to provide the jury with the publications in their entirety because, in each case, reading the entire document is necessary for the jury to understand the context and full meaning of the Department of Labor's guidance. The Opinion Letters, in particular, address factually rich scenarios that would be difficult for many jurors to fully understand and internalize based on a single reading of the document by the Court. If the Court provides the jury with only selected portions of these documents, there is a significant risk that the jury will take a passage out of context and apply the guidance in a manner that is inconsistent with the DOL's intent. To avoid that risk, the Court should provide the jury with the above-noted Opinion Letters and the Field Operations Handbook section in their entirety.

Dated: October 10, 2013

Respectfully submitted,

/s/ Barry J. Miller

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CERTIFICATE OF SERVICE

I certify that on October 10, 2013, I caused to be served a true and correct copy of the foregoing by filing the foregoing Defendant NVR, Inc.'s Memorandum Regarding Submission of Opinion Letters and Other Administrative Guidance to Jury through the Court's ECF system, which is configured to effect delivery by NEF on Plaintiff's counsel:

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s/Barry Miller
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